ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STEPHEN B. JONES, LINDA D. LYDIA and CAROLINE FRANCO, as Texas registered voters,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NUMBER 3:00-CV2543-D
GOVERNOR GEORGE W. BUSH AND RICHARD B. CHENEY, as candidates for President and Vice-President of the United States of America; and Ernest Angelo, Gayle West, Betty R. Hines, James B. Randall, Helen Quiram, Henry W. Teich, Jr., William Earl Juett, Hally B. Clements, Howard Pebley, Jr., Adair Margo, Tom F. Ward, Jr., Carmen P. Castillo, Chuck Jones, Michael Paddie, James Davidson Walker, Joseph I. O'Neil, III, Betsy Lake, Robert J. Peden, Jim Hamlin, Mary E. Cowart, Sue Daniel, James R. Batsell, Loyce McCarter, Michael Dugas, Neal J. Katz, Mary Ceverha, Clyde Moody Siebman, Randall Tye Thomas, Cruz G. Hernandez, John Abney Culberson, Stan Stanart, and Ken Clark, Texas Electors,	§	
Defendants.	§	

DEFENDANTS ERNEST ANGELO, GAYLE WEST, JOSEPH I. O'NEIL, III, BETSY LAKE, JIM HAMLIN, MARY E. COWART, MICHAEL DUGAS, AND JOHN ABNEY CULBERSON'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Ernest Angelo, Gayle West, Joseph I. O'Neil, III, Betsy Lake, Jim Hamlin, Mary E. Cowart, Michael Dugas, and John Abney Culberson, collectively the Elector Defendants, file this

brief in support of their motion to dismiss Plaintiffs' Emergency Amended Complaint and Application for Injunctive and Declaratory Relief ("Amended Complaint") pursuant to Federal Rule of Civil Procedure 12.

Dismissal of this lawsuit is justified on multiple grounds. This Court lacks subject matter jurisdiction because (a) Plaintiffs have no standing to assert an alleged Twelfth Amendment violation and (b) this suit presents a non-justiciable political question. *See* FED. R. CIV. P. 12(b)(1). In addition, this Court lacks personal jurisdiction over the Texas Electors because they have not been served with process. *See* FED. R. CIV. P. 12(b)(2), (4) & (5).

I. THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION BECAUSE PLAINTIFFS LACK STANDING AND FAIL TO PRESENT AN ARTICLE III CASE OR CONTROVERSY.

Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). From a constitutional perspective, an actual Article III "case or controversy" must exist to confer federal jurisdiction. *Id.* at 498-99, 95 S.Ct. at 2205. In addition, there are prudential limitations on standing under which a federal court should decline to exercise jurisdiction. *Id.* at 499-500, 95 S.Ct. at 2205-06.

Plaintiffs lack standing to assert their Twelfth Amendment claim. The Supreme Court has

> consistently held that a plaintiff raising only a generalized grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74, 112 S.Ct. 2130, 2143 (1992). Plaintiffs' Twelfth Amendment claim exemplifies the type of generalized grievance that fails to confer standing to bring suit.

The "generalized interest of all citizens in constitutional governance" is an "abstract injury" insufficient to permit any one citizen to sue. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217, 220, 94 S.Ct. 2925, 2930, 2932 (1974); *see also Lujan*, 504 U.S. at 573-34, 112 S.Ct. at 2143. As the Supreme Court has explained:

> In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Schlesinger, 418 U.S. at 226-27, 94 S.Ct. at 2935. Thus, while the right "to require that the Government be administered according to law" is possessed by every citizen, "[o]bviously this general right does not entitle a private citizen to institute in the federal courts a suit." *Lujan*, 504 U.S. at 574, 112 S.Ct. at 2143 (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129-30, 42 S.Ct. 274, 275 (1922)). Moreover,

> [t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issue in the abstract would create the potential for the abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Schelsinger, 418 U.S. at 222, 94 S.Ct. at 2933. This case squarely implicates the threat of "government by injunction," as Plaintiffs seek an order prohibiting the State of Texas from casting its electoral votes and excluding it from participating in the election of the President and Vice President. Well-established standing principles prohibit Plaintiffs from suing over this type of

citizen grievance. *See id.*; *see also Lujan*, 504 U.S. at 574, 112 S.Ct. at 2143. Because Plaintiffs lack standing, this Court should dismiss. *See* FED. R. CIV. P. 12(b)(1).

II. THIS CASE PRESENTS A NON-JUSTICIABLE POLITICAL QUESTION.

The Court should dismiss Plaintiffs' lawsuit for the alternative reason that it presents a non-justiciable political question. Plaintiffs seek to prevent Texas's electors from voting in the Electoral College on December 18, 2000. *See* U.S. CONST. amend XII; 3 U.S.C. §7; TEX. ELEC. CODE 192.006 (all establishing the timeframe for electoral voting). But the casting of electoral votes in a presidential election is a quintessentially political area into which the judiciary should not intrude. Although purporting to enforce the Twelfth Amendment, this lawsuit actually subverts the very electoral process the Amendment establishes. The Court should reject Plaintiffs' attempt to use the judicial system as a tool to carve Texas out of a national election.

The subject matter of Plaintiffs' lawsuit is closely akin to other areas the Supreme Court has declared off-limits as presenting political questions. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§2.6.2–2.6.8 (2d ed. 1994). A political question is one in which "constitutional interpretation . . . should be left to the politically accountable branches, the president and Congress." *Id.* §2.6.1, at 142. The Supreme Court has generally described political questions as:

- having "a textually demonstrable commitment of the issue to a coordinate political department";
- embodying "a lack of judicially discoverable and manageable standards for resolving it";
- raising "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion";
- raising "the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government";

- evidencing "an unusual need for unquestioning adherence to a political decision already made"; or,
- hazarding "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710 (1962); *see also Nixon v. United States*, 506 U.S. 224, 228-29, 113 S.Ct. 732, 735 (1993); *Gordon v. State of Texas*, 153 F.3d 190, 193 (5th Cir. 1998).

These general descriptions are illuminated by specific areas to which the Court has applied the doctrine. First, the Court has declined to decide whether a variety of state actions regulating elections violate the "republican form of government clause" in article IV, section 4 of the Constitution. *See, e.g., O'Brien v. Brown*, 409 U.S. 1, 92 S.Ct. 2718 (1972) (determining that the political-question doctrine bars jurisdiction over a challenge to the seating of delegates at a national political convention); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224 (1912) (holding that a challenge to the structure of a state voter initiative entails a political question); *Taylor & Marshall v. Beckham*, 178 U.S. 548, 20 S.Ct. 890 (1900) (holding that a challenge to a state's resolution of a disputed gubernatorial race presented a non-justiciable political question). Second, the Court has declined to rule on congressional judgments pertaining to Congress's internal governance. *See* CHEMERINSKY §2.6.5; *Roudebush v. Hartke*, 405 U.S. 15, 19 & n.6, 92 S.Ct. 804, 807 & n.6 (1972) (determining that article I, section 5, clause 1 of the Constitution, which makes the Senate the "Judge . . . of its own Members," does not preclude a state recount in a senatorial election, but that the question of which "candidate is entitled to be seated in the Senate [constitutes] a non-justiciable political question."); *see generally Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944 (1969). Similarly, the Court has held that challenges to the impeachment process are non-justiciable

because the process is textually committed by article I, section 3 to the Senate. *See Nixon*, 506 U.S. at 237-38, 113 S.Ct. at 740.

These specific examples, along with the general principles enunciated in *Baker*, establish that Plaintiffs' lawsuit implicates a non-justiciable political question. In particular, there is "a textually demonstrable commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217, 82 S.Ct. at 710. Under the Constitution, the authority to count and determine the validity of electoral votes has been textually committed to both houses of Congress. U.S. CONST. amend. XII; *see also* 3 U.S.C. §15. The Twelfth Amendment directs the electors to sign, certify, and "transmit [their votes] sealed to the seat of government of the United States, directed to the President of the Senate." U.S. CONST. amend XII. Then "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." *Id.* Federal law confirms that the textual commitment to Congress extends not only to counting the electoral votes, but also to entertaining objections to particular votes. *See* 3 U.S.C. §15 (providing that the President of the Senate shall call for objections, which "shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof"). Objections must be signed by at least one Senator and one Representative. *Id.* The two houses of Congress are then directed to withdraw and consider the objections, and they may reject challenged votes if they "concurrently agree that such vote or votes have not been so regularly given by electors." *Id.* Because the Constitution clearly commits supervision of the electoral process to both houses of Congress, a challenge to that process falls squarely within the ambit of the political-question doctrine.

Reinforcing this conclusion, moreover, is the lack of judicially manageable standards for resolving an attack on the electoral process. *See Nixon*, 506 U.S. at 228-29, 113 S.Ct. at 735 ("[T]he

lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch"). Plaintiffs' request for an injunction against certification of Texas's electoral votes reveals the danger inherent in any attempt to judicially manage this issue. The Court would be in the position of monitoring and supervising not only the casting of Texas's votes in the Electoral College, but also Congress's counting and certification of those votes. There simply are no judicially manageable standards for performing this oversight role.

More is at stake here than 32 electoral votes. This lawsuit, if successful, would disenfranchise the State of Texas and preclude its participation in the national political process. The result would be judicial abrogation of a constitutional cornerstone in the Framers' vision of the republic. *See* U.S. CONST. art II, §1, cl. 2; *id.* cl. 3 (amended by U.S. CONST. amend. XII). This dramatic break with our nation's political history should not be effected through judicial order. This case presents a classic political question, and the Court should dismiss. *See* FED. R. CIV. P. 12(b)(1).

III. THIS COURT SHOULD DISMISS PLAINTIFFS' AMENDED COMPLAINT BECAUSE THE TEXAS ELECTORS HAVE NOT BEEN SERVED WITH PROCESS.

Plaintiffs' Amended Complaint should be dismissed because Plaintiffs have not served the Texas Electors with process. Plaintiffs' original complaint named the 32 Texas Electors as "Doe" parties. The Amended Complaint now actually names these parties. As of the date of the filing of the Elector Defendants' motion to dismiss, none of the Texas Electors have been served with process and most of the Texas Electors are not even aware that they have been named as defendants in this lawsuit.[1] While the Amended Complaint alleges the city in which each Texas Elector resides, it does

1. The undersigned is in the process of contacting all 32 Texas Electors to apprize them of the filing of Plaintiffs' Amended Complaint. As of this moment, the undersigned only represents 6 of the 32 electors.

not provide any specific address information that will enable a process server to actually accomplish service on these defendants. Unless and until service of process is accomplished, this Court lacks personal jurisdiction over the Texas Electors. Accordingly, any injunctive or declaratory relief is improper and this case should be dismissed. *See* FED. R. CIV. P. 12(b)(2), (4), & (5).

WHEREFORE, PREMISES CONSIDERED, the Elector Defendants respectfully request that this Court grant the Elector Defendants' motion to dismiss Plaintiffs' Amended Complaint and grant the Elector Defendants all other relief to which they are justly entitled.

Respectfully submitted,
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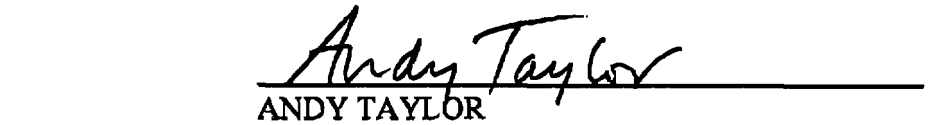

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via certified mail, return receipt requested and facsimile this 27th day of November, 2000, to:

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